

United States
10
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE P. CLARK, Trustee in Bankruptcy of
the Estate of EDNA G. MILENS, Bankrupt,
Appellant,

vs.

EDNA G. MILENS,

Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON.

FILED

APR 13 1920

PAUL P. O'BRIEN,
CLERK

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Circuit Court of Appeals
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer to Citation Dated December 11, 1928, Requiring Edna G. Milens, Bankrupt, to Show Cause Why She Should not be Ad- judged Guilty of Contempt, etc.....	8
Assignments of Error	24
Certificate of Clerk U. S. District Court to Transcript of Record.....	20
Citation on Appeal	28
Citation Requiring Edna G. Milens to Appear and Show Cause Why She Should not be Punished for Contempt	6
Mandate	3
Motion to Strike out Answer	14
Opinion	16
Order Allowing Appeal Without Bond.....	27
Order Dismissing Citation Proceedings With Prejudice	19
Order Dismissing Contempt Proceedings.....	2

Index.	Page
Order Requiring Edna G. Milens to Turn Over to Her Trustees Assets Unaccounted for to Such Trustee.....	1
Petition for Order Allowing Appeal from the Order Made by the District Court of the United States for the District of Oregon Purging Edna G. Milens of Contempt.....	21

In the District Court of the United States for the
District of Oregon.

No. 10,261.

In the Matter of EDNA G. MILENS, Doing Business as GUARANTEE SHOE STORE,
Bankrupt.

ORDER REQUIRING EDNA G. MILENS TO
TURN OVER TO HER TRUSTEE ASSETS
UNACCOUNTED FOR TO SUCH TRUSTEE.

George P. Clark, the trustee herein, having applied to this Court for an order requiring the bankrupt herein to forthwith account for and pay over to the trustee the sum of \$5,377.36 in cash belonging to said estate in bankruptcy and alleged by the trustee to be in the possession of the said bankrupt and to be concealed by her from her trustee, and an order to show cause having been issued out of this court based upon said petition and served upon the said Edna G. Milens, and a hearing having been had upon said order on the 6th day of July, 1927, at which hearing said Edna G. Milens appeared in person and by her attorney and the Referee having heard the testimony in support of said petition and being fully advised, and a decision having been rendered thereon,—

Now, on reading and filing the petition of George P. Clark, trustee in bankruptcy herein, and con-

sidered the testimony offered in support of said petition, and being fully advised,—

IT IS, UPON MOTION OF COAN & ROSENBERG, ATTORNEYS FOR TRUSTEE, ORDERED that the prayer of the trustee's petition herein be and the same is hereby granted, and IT IS FURTHER ORDERED that Edna G. Milens, the above-named bankrupt, account for and pay over within five days from the date of this order, to George P. Clark, trustee in bankruptcy of the estate of Edna G. Milens, bankrupt, the sum of \$5,377.37, belonging to said estate, and which amount this Court now finds is in her possession and under her control.

(Signed) A. M. CANNON,
Referee.

Dated this 22d day of July, 1927.

Filed November 21, 1927. [1*]

[Title of Court and Cause.]

ORDER DISMISSING CONTEMPT PROCEEDINGS.

Said cause having come on for hearing before the above-entitled court on Monday, the 16th day of March, 1928, upon rule to show cause why Edna G. Milens should not be punished for contempt for failure to obey lawful order, said Edna G. Milens appearing in person and her counsel, James H.

*Page-number appearing at the foot of page of original certified Transcript of Record.

McMenamin, and the Trustee in Bankruptcy herein being represented by Coan & Rosenberg, attorneys at law, and the Court having heard the argument of the respective parties, and having taken said matter under consideration, and being fully advised in the premises, does now

ORDER that said contempt proceedings against said Edna G. Milens be, and the same are hereby, dismissed and she is purged of contempt in said cause.

Signed—R. S. BEAN,
Judge.

Filed this 28th day of April, 1928. [2]

MANDATE.

United States of America,—ss.

The President of the United States of America, to
the Honorable the Judges of the District
[Seal] Court of the United States for the ——
District of Oregon, GREETING:

Whereas, lately in the District Court of the United States for the —— District of Oregon, before you, or some of you, in the Matter of Edna G. Milens, Doing Business as Guarantee Shoe Store, Bankrupt, No. 10,261, an order purging of contempt was duly entered on the 28th day of April, A. D. 1928, in the words following to wit:

“ * * * Order that said contempt proceedings against said Edna G. Milens be, and

the same are hereby dismissed and she is purged of contempt in said cause.

(Signed) R. S. BEAN,
Judge. * * * ”

Which said order is of record and fully set out in said cause in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof, and ———, as by the inspection of the transcript of the record ——— of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by George P. Clark, Trustee in Bankruptcy of the Estate of Edna G. Milens, as appellant, against Edna G. Milens, as appellee, agreeably to the Act of Congress ——— in such cases made and provided, fully and at large appears: [3]

AND WHEREAS, on the 20th day of September, in the year of our Lord one thousand nine hundred and twenty-eight, the said cause came on to be heard before the said Circuit Court of Appeals, on the said ——— transcript of record, and was duly argued and submitted,—

ON CONSIDERATION WHEREOF, it is now here ORDERED, ADJUDGED, and DECREED by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, with costs in favor of the appellant, and against the appellee, and that this cause be, and hereby is, remanded to the said District Court, with directions

to take further proceedings not out of harmony with the opinion of this Court.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by this Court, that the appellant recover against the appellee for his costs herein expended, and have execution therefor.

(October 8, 1928.)

YOU, THEREFORE, ARE HEREBY COMMANDED, That such execution and further proceedings be had in the said cause in accordance with the opinion and decree of this Court, and —— as according to right and justice and the laws of the United States ought to be had, the said decree —— of the said District Court notwithstanding.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 8th day of November, in the year of our Lord one thousand nine hundred and twenty-eight.

PAUL P. O'BRIEN (Sgd.),
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

AMOUNT OF COSTS ALLOWED AND TAXED in favor of appellant and against appellee as per Annexed Bill of Items, taxed in detail: \$96.40.

(Sgd.) PAUL P. O'BRIEN,
Clerk.

Filed November 16, 1928. [4]

[Title of Court and Cause.]

CITATION REQUIRING EDNA G. MILENS
TO APPEAR AND SHOW CAUSE WHY
SHE SHOULD NOT BE PUNISHED FOR
CONTEMPT.

An order having been made herein by this Court on the 17th day of March, 1928, requiring the bankrupt to show cause why she should not be punished for contempt for having disobeyed the lawful order of Hon. A. M. Cannon, Referee in Bankruptcy dated May 17th, 1927, directing the said bankrupt to pay over to her said trustee in bankruptcy, George P. Clark, the sum of \$5,377.37, and the same having come on for hearing before the above-entitled court and an order having been entered based upon said hearing on the 28th day of April, 1927, purging the bankrupt of her contempt from which order the said trustee, George P. Clark, appealed to the Circuit Court of Appeals for the Ninth Circuit, and this matter having come on to be heard before said Appellate Court, the trustee appearing by and through his attorneys, Coan & Rosenberg, and the bankrupt appearing by and through her attorney, James H. McMenamin, and the said Circuit Court of Appeals for the Ninth Circuit having on the 8th day of October, 1928, filed in said court an opinion upon which opinion, a mandate of said Appellate Court was filed and entered in this court on the 19th day of November, 1928, reversing the order of this Court purging the

bankrupt of contempt and directing the District Court of the United States for the District of Oregon to take further proceedings in this matter not out of harmony with the opinion of said Appellate Court.

Now, on motion of Coan & Rosenberg, attorneys for said trustee,—

IT IS HEREBY ORDERED that Edna G. Milens show cause before this court at the Federal Courthouse in the city of Portland, Oregon, on Monday, the 17th day of December, 1928, at 10 o'clock A. M. on said [5] day or as soon thereafter as counsel can be heard, why she should not be adjudged guilty of contempt of court and be committed by imprisonment by the United States Marshal of the District of Oregon for failure to comply with the lawful order of Hon. A. M. Cannon, Referee in Bankruptcy, dated July 22d, 1927.

IT IS FURTHER ORDERED that service of a copy of this order upon the bankrupt's attorney, James H. McMenamin, shall be sufficient service upon the said Edna G. Milens, if made on or before the 11th day of December, 1928.

R. S. BEAN,
District Judge.

Dated this 11th day of December, 1928.

Filed December 11, 1928. [6]

[Title of Court and Cause.]

ANSWER TO CITATION DATED DECEMBER
11, 1928, REQUIRING EDNA G. MILENS,
BANKRUPT, TO SHOW CAUSE WHY
SHE SHOULD NOT BE ADJUDGED
GUILTY OF CONTEMPT, ETC.

Comes now Edna G. Milens, the bankrupt person above named, and for answer to said citation in said cause bearing date the 11th day of December, 1928, admits, denies and alleges, as follows:

I.

Said bankrupt herewith submits herself to the above-entitled court and throws herself wholly and completely upon the mercy of the Court.

II.

Said bankrupt, in answer to said citation dated December 1, 1928, denies in the premises that she ever disobeyed any rules of the court in the above-entitled cause.

III.

Said bankrupt alleges that the alleged findings of fact in said cause do bear date the 22d day of July, 1927, and said bankrupt admits that she was present at a hearing before said Referee, whereat the matter of Five Thousand Three Hundred Seventy-seven and 37/100 (\$5,377.37) Dollars was a matter of contention before the said court. Said bankrupt alleges with reference thereto that she has no recollection of any order having been served upon her to pay over \$5,377.37, and does not now recollect

any order having been served upon her, requiring her to be and appear for any contempt orders, or with reference to contempt matters, save and except a certain order bearing date March 17, 1928, requiring her to be and appear before the above-entitled court on Monday, the 26th day of March, 1928. [7]

IV.

Said bankrupt further alleges that she takes exception to and denies the correctness of the findings of fact herein, wherein said Referee in Bankruptcy, heretofore, in paragraphs IV, V, and VI, of his said findings of fact, found as follows:

IV.

“The Referee further finds that of the sum of \$5,377.37 withdrawn by the bankrupt from the business in cash, a large amount was drawn therefrom *immediate* preceding the adjudication in bankruptcy herein.

V.

The Referee further finds that the bankrupt, although given every opportunity to explain what has become of said money, has wholly failed to account for the use of said money or to give any plausible explanation as to the use hereof and the Referee finds that said sum of \$5,377.37 was in the possession of the bankrupt at the date of the adjudication in bankruptcy herein and was and now is concealed by said bankruptcy from her trustee in bankruptcy, George P. Clark.

VI.

The Referee further finds that the said bankrupt Edna G. Milens, now has in her possession said sum of \$5,377.37 which she has failed and refused and still fails and refuses to account for or pay over to the trustee and which sum the Referee finds the bankrupt does now knowingly and fraudulently and wilfully conceal from her trustee in bankruptcy."

Said bankrupt alleges, with reference thereto, notwithstanding the findings of said Referee, she did not have in her possession, at any time, said alleged cash of \$5,377.37 and has never had said amount, or any amount of money with reference thereto, then, ever since, or now.

V.

Said bankrupt further alleges that she is wholly and completely financially embarrassed and has been for some time past physically disabled.

Said bankrupt, as affirmative response and defense herein, alleges:

I.

Bankrupt alleges that it has never been shown in the records that said bankrupt had any specific fund or specific property in her possession and further alleges that she has not at any time herein mentioned, had any specific fund or specific property in her possession out of which to comply with said order of said Referee. [8]

II.

Bankrupt further alleges that it has never been

shown in the records that said bankrupt, at any time in the proceedings, could have turned over said specific funds to said trustee of said estate.

III.

Bankrupt further alleges that it has never been shown in the records and in the proceedings that said bankrupt had in her possession at the time said order of the Referee was made, the particular and specific sum of money named in said Referee's order, and bankrupt further alleges that she does not now have, and has not at any time herein, had in her possession the particular and specific sum of money named in said Referee's order and has not, at any time herein, had any sum of money in the premises belonging to said trustee.

IV.

Bankrupt further alleges that it has never been shown in the records that said bankrupt had the physical ability to turn the sums ordered by said Referee over to said trustee, and bankrupt further alleges that she did not have, at any time herein, and does not now have the physical ability to turn over the sums of money to the trustee, ordered to be done by her by said Referee.

V.

Bankrupt further alleges that it has never been shown in said estate that said bankrupt willfully and fraudulently refused to abide by the Referee's order in the premises.

VI.

Bankrupt further alleges that there is a complete

failure of proof in said cause of facts warranting the findings of said Referee in said cause.

VII.

Bankrupt further alleges that she has heretofore, in said cause, filed her petition to be discharged in bankruptcy; that there [9] were no objections filed, save and except, by the J. P. Smith Shoe Company, a corporation, of Chicago, State of Illinois, which objection was filed on the 4th day of February, 1928. Said bankrupt further alleges that she filed her answer thereto; that a hearing was had thereon before said Referee on March 19, 1928; that said bankrupt, in said answer, prayed that the objection of said J. P. Smith Shoe Company, a corporation, be dismissed with prejudice; that said Referee, A. M. Cannon, in said cause, at said hearing on said 19th day of March, 1928, set, as a Special Master, and, as said bankrupt is now informed and believes, did, as such Special Master, deny the prayer of the answer of said bankrupt to said objections of said J. P. Smith Shoe Company, a corporation, to which acts and rulings of said Master, your bankrupt took exceptions, on the ground that said Special Master, as such, at said time and place, acted outside of his authority in such cases made and provided.

VIII.

Bankrupt further alleges and shows to the Court that she has done everything within her power in the premises to keep within the law and to abide by all judgments of the Court and Referee in Bankruptcy herein; that if, in any particular, she has made any

mistake, she alleges that it is without her knowledge and fault; bankrupt further alleges that she makes this answer to said citation of Court, dated December 11, 1928, for the purpose of setting before the Court the facts herein as she knows them, to the end that she may be purged of any contempt of Court herein.

WHEREFORE, said bankrupt prays that said citation be dismissed with prejudice herein; that said bankrupt be purged of any contempt in said cause in the premises; that her petition for discharge in bankruptcy be allowed; that said objections of the J. P. Smith Shoe Company, a corporation, in the premises, be denied with prejudice; that the rulings of said Special Master on legal points in said cause in [10] said hearing on March 19, 1928, be vacated and set aside; for such other and further relief herein to the end that she may be discharged as a bankrupt in said cause, as heretofore prayed for by her.

T. J. CLEETON and
JAMES H. McMENAMIN,
Attorneys for Bankrupt.

(Sgd.) EDNA G. MILENS,
Bankrupt.

State of Oregon,
County of Multnomah,—ss.

I, Edna G. Milens, being first duly sworn, say that I am the bankrupt named in the within entitled cause, and that the foregoing response and answer to citation is true as I verily believe.

EDNA G. MILENS.

Subscribed and sworn to before me this 16th day of December, 1928.

[Seal]

K. B. MEEKER,

Notary Public for Oregon.

My commission expires Nov. 30, 1930.

Due and timely service of the foregoing, and a receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 16th day of December, 1928.

COAN & ROSENBERG,

Attorneys for Trustee.

Filed December 17, 1928. [11]

[Title of Court and Cause.]

MOTION TO STRIKE OUT ANSWER.

Comes now George P. Clark, trustee in bankruptcy of the estate of Edna G. Milens, doing business as Guarentee Shoe Store, Bankrupt, and moves to strike out answer filed December 17th, 1928, to citation requiring the bankrupt to show cause why she should not be adjudged guilty of contempt on the ground and for the reason that an answer to the original citation requiring Edna G. Milens, bankrupt, to show cause why she should not be adjudged guilty of contempt was filed herein on the 26th day of March, 1928, and is now an answer to the original show cause order in this proceeding, said original show cause order dated March 17th, 1928,

being the only contempt proceeding before this court.

Signed—COAN & ROSENBERG,
Attorneys for Trustee.

To Edna G. Milens, and Her Attorney Jas. H. McMenamin:

Please take notice that in presenting the above motion trustee will rely upon Rules of Practice for Court of Equity for United States, Rule No. 33.

Signed—COAN & ROSENBERG,
Attorneys for Trustee. [12]

State of Oregon,
County of Multnomah,—ss.

I hereby certify that the foregoing is a true and correct copy of the original.

That the said motion in my opinion is well founded in law.

Dated December 19, 1928.

COAN & ROSENBERG,
Attorneys for Trustee.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 19th day of December, 1928.

JAMES H. McMENAMIN,
Of Attorneys for Bankrupt.

Filed December 20, 1928. [13]

[Title of Court and Cause.]

OPINION.

Portland, Oregon, January 2, 1929.

R. S. BEAN, District Judge. (Oral.)

This matter was submitted on a petition to punish the bankrupt for contempt. It seems that in June, 1927, the Referee, after a hearing, found that the bankrupt had in her possession the sum of \$5,000 in money belonging to the estate, and made an order directing her to pay it over to the trustee. No attempt was made to have this order refuted or set aside, and in due time the Referee reported the facts to the Court and recommended that the bankrupt be proceeded against for a contempt. The usual case order was made, in obedience to which the bankrupt appeared and answered that she was unable to comply with the order, and the Court, without taking any testimony dismissed the proceedings. Upon appeal it was held that the order of the Referee was conclusive and operated as an estoppel and remanded the case for such further proceedings as might be proper not inconsistent with the opinion, and the question is again before the court.

On the present hearing the bankrupt appeared, testified as a witness under oath that she did not have any money belonging to the estate at the time the Referee's order was made or since, and that she has not now any money or property with which to make the payment, and is wholly unable to do so. This evidence is uncontradicted and unimpeached,

but notwithstanding the trustee insists that the bankrupt should be committed for contempt. For the purpose of this proceeding the findings of the Referee are conclusive upon the parties and a judicial estoppel. It may be that the bankrupt's admission that she has not complied with the order makes out a *prima facie* case for contempt from which she can only purge herself by showing that for sufficient reason [14] she is now unable to obey the order. The burden is upon her to do so, but as stated by the Court of Appeals in the *instance* case, the coercive measure is applied only when and so long as the defendant is able to obey.

The question, therefore, I take it, is whether the bankrupt is at present able to comply with the order, or in other words, whether her failure is wilful or unavoidable, and the Court must be satisfied beyond peradventure of her contumacy before it is justified in committing her for contempt. In some cases it is said the Court must be satisfied beyond reasonable doubt of the person's ability to comply with the order. Such was the holding of Judge Brewster in a recent case in Massachusetts reported in the Bankruptcy reports.

It is argued that because the Referee found that the bankrupt had in her possession the money at the time of the adjudication and that order stands unreversed or unmodified it must be assumed conclusively that she had the money at the time the order was made, and that she can purge herself from contempt only by showing what disposition she made of the money, whether in fact she

had it or not, or regardless of her present ability to comply with the order, but I do not so understand the law. A commitment for contempt is an extraordinary remedy and should be resorted to only when the Court is satisfied of the defendant's present ability to comply with the order. The futility and injustice of depriving an individual of his liberty for failing to do the impossible suggests such a conclusion. No person should be imprisoned for contempt for failing to obey an order to pay over money when his inability to comply therewith conclusively appears. To commit the defendant now for contempt would be a useless proceeding because she could return into court at any time to purge herself by showing that she was unable to comply with the order, and therefore I take it that the petition should be dismissed.

Filed March 28, 1929. [15]

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of opinion of Bean, D. J., dated January 2, 1929, in Cause No. B-10261, in the matter of Edna G. Milens, Bankrupt, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at

Portland, in said District, this 28th day of March, 1929.

[Seal]

G. H. MARSH,
Clerk.

By L. G. Rogers,
Deputy Clerk. [15a]

[Title of Court and Cause.]

ORDER DISMISSING CITATION PROCEED-
INGS WITH PREJUDICE.

The above matter coming on for trial before the above-entitled court on the 26th day of December, 1928, bankrupt appearing in person and by her counsel, T. J. Cleeton and James H. McMenamin, and George P. Clark, trustee in bankruptcy, appearing in person and by his counsel, Coan & Rosenberg, and the Court having taken evidence at said trial and having heard the argument of the respective counsel, and thereafter, having taken said cause under consideration and being now fully informed in the matter, it is by the Court

ORDERED AND ADJUDGED, that the contempt proceedings herein instituted against said bankrupt, Edna G. Milens, be dismissed with prejudice.

Dated this 11th day of January, 1929.

(Sgd.) R. S. BEAN,
Judge.

Filed January 11, 1929. [16]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of order of Referee in Bankruptcy dated June 22, 1927, requiring bankrupt to turn over to trustee assets; order by R. S. Bean, District Judge, dated April 28, 1928, purging bankrupt of contempt; mandate of the United States Circuit Court of Appeals dated November 8, 1928; citation dated December 11, 1928, requiring bankrupt to show cause why she should not be punished for contempt; answer by bankrupt filed December 17, 1928, to citation; motion filed December 20, 1928, to strike out answer; and order by R. S. Bean, District Judge, dated January 11, 1929, purging bankrupt of contempt, have been by me compared with the original thereof, and that each is a correct transcript of the original therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 23d day of March, 1929.

[Seal]

G. H. MARSH,
Clerk. [17]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Matter of EDNA G. MILENS, Doing Business as GUARANTEE SHOE STORE,
Bankrupt.

PETITION FOR ORDER ALLOWING APPEAL
FROM THE ORDER MADE BY THE
DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF ORE-
GON PURGING EDNA G. MILENS OF
CONTEMPT.

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

Your petitioner, George P. Clark, trustee in bankruptcy of the above-entitled bankrupt estate conceiving himself aggrieved by an order of the District Court of the United States for the District of Oregon entered on the 11th day of January, 1929, dismissing with prejudice certain contempt proceedings against the said Edna G. Milens, bankrupt, for failing to comply with the valid order made by Hon. A. M. Cannon, Referee in Bankruptcy, dated the 22d day of July, 1927, which order required the said Edna G. Milens to pay over to George P. Clark, as trustee in bankruptcy of the estate of Edna G. Milens, bankrupt, the sum of \$5,377.37 found by the Referee to be in the possession and control of said bankrupt on said day and fraudulently and wilfully concealed by her from her trus-

tee, and which order was entered by the District Court of the United States for the District of Oregon following an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order entered on the 28th day of April, 1928, dismissing certain contempt proceedings against the said Edna G. Milens, bankrupt, for failure to comply with the valid and lawful order made by Hon. A. M. Cannon on July 22d, 1927, as above stated, and which said order of April 28, 1928, of the District Court of the United States for the District of Oregon upon appeal was reversed by the United States Circuit Court of Appeals for the Ninth Circuit in an opinion filed October 8, 1928, in said court, upon which opinion, a mandate [19] of the United States Circuit Court of Appeals for the Ninth Circuit was filed and entered in the District Court of the United States for the District of Oregon on the 19th day of November, 1928, directing the District Court of the United States for the District of Oregon to take further proceedings in this matter not out of harmony with the opinion of said Circuit Court of Appeals for the Ninth Circuit, which culminated in the order of the District Court of the United States for the District of Oregon dated January 11, 1929, purging the bankrupt of contempt.

Your petitioner does hereby petition for an appeal from said order of January 11th, 1929, of the District Court of the United States for the District of Oregon to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that his

appeal may be allowed and that a citation issue directed to Edna G. Milens, bankrupt, commanding her to appear before the United States Circuit Court of Appeals for the Ninth Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and other papers upon which said order was based, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

GEORGE P. CLARK,

Trustee in Bankruptcy of Edna G. Milens, Bankrupt.

COAN & ROSENBERG,

Attorneys for the Trustee and Petitioner.

[20]

State of Oregon,

County of Multnomah,—ss.

I, George P. Clark, being first duly sworn, depose and say: That I am the duly qualified and acting trustee of the above estate, that I have read the foregoing petition and that the same is true as I verily believe.

GEORGE P. CLARK.

Subscribed and sworn to before me this 5th day of February, 1929.

[Seal] ABE EUGENE ROSENBERG,

Notary Public for Oregon.

My commission expires Oct. 31, 1931. [21]

[Endorsed]: Petition for Order Allowing Appeal from the Order Made by the District Court of the

United States for the District of Oregon Purging
Edna G. Milens of Contempt. Filed Feb. 7, 1929.
Paul P. O'Brien, Clerk. [22]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Matter of EDNA C. MILENS, Doing Busi-
ness as GUARANTEE SHOE STORE,
Bankrupt.

ASSIGNMENTS OF ERROR.

Comes now George P. Clark, trustee in bankruptcy of the estate of Edna G. Milens, bankrupt, and files the following assignments of error on appeal from an order made and entered by the District Court of the United States for the District of Oregon, on the 11th day of January, 1929, dismissing contempt proceedings against Edna G. Milens and purging her of contempt for failure to obey the order of the Referee made on the 22d day of July, 1927, contrary to the opinion of the United States Circuit Court of Appeals for the Ninth Circuit filed on October 8th, 1928, reversing an order of the District Court of the United States for the District of Oregon and dated the 28th day of April, 1928, dismissing contempt proceedings against Edna G. Milens, bankrupt, and purging her of contempt for failure to obey the order of the Referee made the 22d day of July, 1927, and contrary to the mandate of the United States Circuit Court of

Appeals for the Ninth Circuit in the above case dated November 19, 1928, directing the District Court of the United States for the District of Oregon to take further proceedings not out of harmony with the opinion of the United States Circuit Court of Appeals for the Ninth Circuit.

1. That the United States District Court for the District of Oregon erred in failing and refusing to make and enter an order upon the citation dated December 11, 1928, requiring Edna G. Milens to appear and show cause why she should not be punished for contempt as provided in the opinion of the United States Circuit Court of Appeals for the Ninth Circuit filed in this cause in said appellate court on the 8th day of October, 1928, reversing a prior order of the District Court of the [23] United States for the District of Oregon dated April 28, 1928, purging the bankrupt of contempt upon which opinion a mandate was entered in the United States District Court for the District of Oregon on the 19th day of November, 1928.

2. That the United States District Court for the District of Oregon erred in making and entering an order on the 11th day of January, 1929, dismissing with prejudice the contempt proceedings against the bankrupt, Edna G. Milens, for failure to obey the lawful order of the Referee in Bankruptcy dated the 22d day of July, 1927, requiring said bankrupt to turn over the assets of said estate concealed by her amounting to \$5,377.37 to George P. Clark, trustee in bankruptcy of her estate.

3. That the United States District Court for the

District of Oregon erred in making and entering an order on the 11th day of January, 1929, dismissing with prejudice the contempt proceedings against the bankrupt, Edna G. Milens, without any testimony on behalf of Edna G. Milens, bankrupt, showing the disposition or disappearance of the sum of \$5,377.37, which sum the Referee in Bankruptcy found she had in her possession on the 22d day of July, 1927, and that she was fraudulently and wilfully concealing the same from her trustee upon which finding an order dated the 22d day of July, 1927, by the Referee required Edna G. Milens, the bankrupt, to turn over the sum of \$5,377.37, wilfully and fraudulently concealed by her to George P. Clark her trustee in bankruptcy and which findings and order have never been reviewed, appealed, vacated, modified or reversed.

WHEREFORE, George P. Clark, trustee in bankruptcy of the estate of Edna G. Milens, bankrupt, prays that said order so made on the 11th day of January, 1929, by the District Court of the United States for the District of Oregon may be vacated and that an order be made adjudging and decreeing Edna G. Milens in contempt for failure to obey the lawful order of the Referee in Bankruptcy dated the 22d day of July, 1927, requiring her to pay over to George P. [24] Clark, her trustee in bankruptcy, the sum of \$5,377.37.

COAN & ROSENBERG,

Attorneys for George P. Clark, Trustee in Bankruptcy of Edna G. Milens, Bankrupt. [25]

[Endorsed]: Assignments of Error. Filed Feb. 7, 1929. Paul P. O'Brien, Clerk. [26]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Matter of EDNA G. MILENS, Doing Business as GUARANTEE SHOE STORE,
Bankrupt.

ORDER ALLOWING APPEAL WITHOUT
BOND.

Now, on this 7th day of February, 1929, the above-entitled proceeding coming on regularly to be heard upon petition of George P. Clark, trustee in bankruptcy of the estate of Edna G. Milens, bankrupt, praying that an appeal may be allowed him herein from that certain order of the District Court of the United States for the District of Oregon, made and entered on the 11th day of January, 1929, and that citation issue as provided by law and that a transcript of the records, proceedings and other papers upon which said order was based, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and proper assignments of error having been presented with said petition;

And it appearing to the Court that said petitioner is entitled to said appeal,—

NOW, THEREFORE, on motion of Coan & Rosenberg, counsel for petitioner,

IT IS HEREBY ORDERED that the said petition be and the same is hereby granted and the appeal of the petitioner from said order to the United States Circuit Court of Appeals for the Ninth Circuit is hereby allowed.

And it further appearing that the appellant herein is the trustee in bankruptcy of the estate of Edna G. Milens, bankrupt—

IT IS FURTHER ORDERED that no bond be required of him.

FRANK H. RUDKIN,
Circuit Judge.

Dated this 7th day of February, 1929.

[Endorsed]: Order Allowing Appeal Without Bond. Filed Feb. 7, 1929. Paul P. O'Brien, Clerk. [27]

CITATION ON APPEAL.

District Court of the United States of America,
District of Oregon.

To Edna G. Milens, GREETING:

WHEREAS, George P. Clark, Trustee in Bankruptcy of the estate of Edna G. Milens, bankrupt, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law,—

YOU ARE THEREFORE HEREBY CITED AND ADMONISHED to be and appear before said

United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, in said District, this 7th day of February, in the year of our Lord one thousand nine hundred and twenty-nine.

FRANK H. RUDKIN,

U. S. Circuit Judge.

Certified copy of the foregoing left at my office this 9th day of Feby., 1929.

JAMES H. McMENAMIN,

Of Attorneys for Trustee of Edna G. Milens, Bankrupt.

[Endorsed]: Citation on Appeal. Filed Feb. 11, 1929. Paul P. O'Brien, Clerk. [28]

[Endorsed]: No. 5713. United States Circuit Court of Appeals for the Ninth Circuit. George P. Clark, Trustee in Bankruptcy of the Estate of Edna G. Milens, Bankrupt, Appellant, vs. Edna G. Milens, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed March 27, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

